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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1531

LEX TEX LTD., INC.,

Petitioner,

v.

UNIVERSAL TEXTURED YARNS, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT UNIVERSAL TEXTURED YARNS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

David Klingsberg
Counsel for Respondent
Universal Textured Yarns, Inc.
425 Park Avenue
New York, New York 10022
(212) 759-8400

Of Counsel:
David Rabin
David F. Ryan
Kaye, Scholer, Fierman,
Hays & Handler

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Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit is reported at 541 F.2d 1127 (5th Cir. 1976), and is printed in petitioner's Appendix (App. 78a). The opinion of the District Court is reported at 398 F. Supp. 31 (S.D. Fla. 1975) and also is printed in petitioner's Appendix (App. 3a).*

* A supplemental opinion of the District Court in a case concerning other parties not involved in this Petition is reported at 398 F. Supp. 51 (S.D. Fla. 1975) (App. 34a).

Jurisdiction

Petitioner seeks to invoke the Court's jurisdiction under 28 U.S.C. §1254(1). The mandate of the Court of Appeals was entered on February 11, 1977, after rehearing and rehearing en banc had been denied on February 3, 1977.

Question Presented

The Petition raises no important questions for review. The essential issue presented is as follows:

> Whether this Court should review the Court of Appeals' unanimous affirmance of The District Court's determination of patent misuse, based on a finding, derived from uncontroverted documentary evidence, that petitioner—the owner of a patent relating to texturing machinery—and three competing manufacturers and sellers of such texturing machinery agreed, in the context of alleged patent licensing arrangements, to fix a major portion of the total purchase price of the machinery to be received by each of the three manufacturers.

Petitioner seeks to raise two questions concerning the misuse determination. First, petitioner contends that an important question is presented by its allegations that it did not bring certain evidence to the attention of either the District Court or the Court of Appeals because the relevance of such evidence "to any theory of misuse or price fixing did not appear until explicated in the Fifth Circuit's opinion" (Pet. 11). This question plainly is not of sufficient moment to warrant review by this Court. In any event, as we show herein, the legal basis for the misuse found below

was argued by respondent to both Courts; in its opposing papers petitioner did cite most of the evidence in question; and such evidence is irrelevant to the issue of patent misuse.

In its second alleged question petitioner seeks to distinguish *United States* v. *Line Material Co.*, 333 U.S. 287 (1948), upon which the Court of Appeals relied in part. This question also raises no important legal issue for review, because petitioner's putative distinctions are inapposite and because, in any event, the challenged agreements constitute patent misuse under a wealth of other precedents of this Court upon which the Court of Appeals also relied.

Statement of the Case

This is an action by petitioner Lex Tex Ltd., Inc. ("Lex Tex") against respondent Universal Textured Yarns, Inc. ("Universal") to recover royalties allegedly due under certain agreements concluded in 1968 and 1969. Under these agreements, Lex Tex purported to license Universal under United States Patent No. 3,091,912 ("the '912 patent") to operate certain "post-treating" or "double heater" textile machinery manufactured and sold by Leesona Corporation ("Leesona").

The Petition seeks review of a portion of the unanimous decision of the Court of Appeals for the Fifth Circuit affirming a judgment for respondent on the ground that the '912 patent had been misused.

The Parties. Petitioner Lex Tex is a corporation engaged in the business of licensing patents relating to texturing processes and machinery. Respondent Universal is a corporation engaged, among other things, in the busi-

ness of processing (or as it is termed in the textile trade "throwing") raw synthetic yarn, and is thus known as a "throwster".

The Patent in Suit. This action only involves the '912 patent, which was the only patent purportedly licensed in the agreements between Universal and Lex Tex. Lex Tex acquired the '912 patent from Leesona which, in turn, had acquired it pursuant to an agreement with The Permatwist Company ("Permatwist"), a partnership which included the two alleged inventors of the '912 patent, Messrs. Stoddard and Seem.

The '912 patent relates to certain so-called post-treating or double heater texturing processes, which are designed to produce a synthetic yarn with more bulk and less stretch than "false twist" or "single heater" yarn.* Messrs. Stoddard and Seem were also the alleged inventors of the false twist or single heater patents.**

The Basic Facts. The undisputed facts, as found by the Courts below, primarily based upon the express terms of written agreements, establish that Leesona Corporation—a textile machinery manufacturer and holder of patents—and the Permatwist partners conceived and implemented a program for licensing both the false twist patents and the post-treating patents in a manner that involved *per se* un-

* United States Patent No. 3,077,724 ('724) is another post-treating patent allegedly developed by Stoddard and Seem. One additional post-treating patent—United States Patent No. 3,472,011 ('001)—was assigned to Lex Tex on June 17, 1971 by Ernest Scragg & Sons, Ltd. ("Scragg"), a competitor of Leesona in the sale of single and double heater machinery in the United States.

** United States Patent Nos. 2,803,105 ('105), 2,803,108 ('108), and 2,803,109 ('109).

lawful price fixing, and accordingly constituted patent misuse.

Royalties collected by Leesona under the false twist program, as disclosed in an affidavit of Leesona's Treasurer filed with the District Court in these proceedings, exceeded $27 million by 1973. Leesona also once acted as a licensor of post-treating technology, including the '912 patent. With the assignment of the '912 patent in 1967, Lex Tex became the successor to this aspect of Leesona's licensing business.

Under the program both sets of patents were licensed to purchasers of machinery who became obligated to pay Leesona a use royalty in connection with operation of the equipment (App. 81a-84a, 86a-87a, 91a, 99a-100a). Then, Lex Tex was formed to take over the post-treating licensing program "under the ownership of Permatwist's general counsel and Leesona's trial counsel" (App. 100a).

In the false twist licensing program, Leesona (with the consent of Permatwist) had concluded 14 agreements with its competitors in the manufacture and sale of texturing equipment (App. 87a). Each of these agreements provided: that the manufacturers could sell the machinery only to throwsters who executed a use license; that the manufacturer was to receive a "kickback" in a fixed amount constituting one-third of the use royalty;* and that Leesona was empowered to fix the use royalty applicable to the operation of the machinery supplied by all participants (App. 22a, 87a, 91a-92a). Through the vehicle of Lex Tex, restrictive agreements were concluded with post-treating machinery manufacturers which paralleled those of the false twist program (App. 100a).

* As in the Court of Appeals, the term "kickback" is employed herein "for want of a better term, without pejorative intent" (App. 84a).

As a result of these arrangements, Leesona (in the case of the false twist program) and Lex Tex (in the case of the post-treating program) acted as conduits for the monetary compensation which passed from the throwsters, who purchased the machinery, to the competing manufacturers who sold the machinery (App. 91a, 100a-101a). Since most of these competing manufacturers had no patents and all received the same fixed compensation, this compensation plainly was not patent-related (App. 91a-92a, 102a).* Rather, the payments were, as the Court of Appeals held, "the direct source of the compensation paid to the machinery manufacturers" which in effect guaranteed them a minimum level of compensation for the machinery each of them sold (App. 91a, 100a-101a). The fixing of these sums constituted the basis for the findings of the Courts below that the patentees and machinery manufacturers engaged in *per se* unlawful price fixing which constituted patent misuse.

The sums fixed also constituted a "major portion of the compensation received by the manufacturers" since with normal use these payments would generate compensation much exceeding the initial sales price of the machinery (App. 87a, 91a). Thus, it was recognized in the industry, as Leesona's former president testified in the context of these arrangements, that "Royalties are price" (App. 23a).

The Decisions Below. The rulings below were made in the context of motions for summary judgment filed in a number of actions consolidated in the Southern District of

* Indeed, Lex Tex states in its Petition that no "license rights are granted to the manufacturer" under these agreements, thus conceding that the "kickbacks" were other than patent-related royalties (Pet. 3).

Florida by the Judicial Panel on Multidistrict Litigation as MDL 82. In this action, Universal sought a summary judgment that the '912 patent had been misused and, therefore, that Lex Tex could not enforce the license agreements upon which the complaint was predicated. By its terms, this motion supplemented a motion filed by Universal in another of the consolidated actions—a suit originally filed in the Middle District of North Carolina by Universal against Lex Tex seeking, *inter alia,* a declaratory judgment that the '912 patent had been misused. Both Universal motions were, by their terms, companions to a motion filed by Universal and other throwsters who originally had sued Leesona in the Eastern District of New York seeking *inter alia,* a declaratory judgment that the false twist or single heater patents had been misused.

The District Court granted the motion which is the subject of this Petition, ruling that the '912 patent had been misused and was thus unenforceable (App. 28a-29a). The District Court also granted the related motion for a summary judgment holding the single heater patents misused (App. 19a-28a).*

In affirming the judgment of the District Court, the Court of Appeals held that the price-fixing provisions of the agreements among Lex Tex and the competing machinery manufacturers were *per se* unlawful under Section 1 of the Sherman Act and, therefore, that the '912 patent had been misused (App. 97a-102a).

* That portion of the District Court's order of April 25, 1974 which granted a motion for summary judgment against Leesona also was appealed to the Court of Appeals (Nos. 74-2836 and 74-2837). Those appeals were dismissed on motion, however, for the reason that they became moot by virtue of settlement during the pendency of the appeals.

ARGUMENT

POINT I

Lex Tex received a full and fair opportunity to rebut the misuse determination.

Lex Tex contends that three pieces of "evidence" it has culled from the record below were not brought to the attention of the District Court or the Court of Appeals simply because the legal theory which makes them "relevant first appeared in the Fifth Circuit's decision" (Pet. 11). To the contrary, the theory that the price-fixing provisions of the manufacturing agreements were *per se* illegal was fully briefed before the District Court which explicitly referred to the price-fixing contention in its opinion (App. 26a; "Reply Memorandum Of New York Throwsters In Support Of Motion For Summary Judgment," pp. 36-48, referred to at App. 28a). The same theory was presented to and accepted by the Court of Appeals (App. 91a-94a, 100a-102a; Brief for Appellee Universal Textured Yarns, Inc., pp. 20-24).

Moreover, two of the items of allegedly "new" evidence were cited to the Court of Appeals by petitioner (Lex Tex App. Brief, pp. 20 n.7, 92); one was quoted from extensively in Lex Tex's appeal brief (*Id.* at 92); and the third item is merely cumulative (Pet. 10).

Finally, this "evidence" is plainly irrelevant to the misuse determination. The documents purport to show that two of the manufacturers who entered into the arrangements—Scragg and Barmag—might have been willing to negotiate a rebate to certain throwsters of some or all of the "kickback" compensation (Pet. 10-11). But evidence

relating to dealings with throwsters other than Universal in late 1970 has nothing whatever to do with Universal's purchase of Leesona post-treating machinery in 1969. Lex Tex has conceded that Leesona would not deliver its equipment unless Universal executed the Lex Tex license under which full royalties were payable (Lex Tex App. Brief, pp. 78-79). Moreover, Lex Tex does not contend that Leesona agreed to rebate any portion of its "kickback" to Universal, and no such agreement was ever made between Leesona and Universal.

Even if such an arrangement had existed, however, this fact would not undermine the misuse ruling of the Court of Appeals. Since the manufacturers agreed upon a major portion of the compensation to be paid by throwsters to each of them in the first instance, a willingness to negotiate a rebate of a portion of this consideration could not save the agreements from illegality. As the Court of Appeals pointed out, relying on *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940), to establish a violation of Section 1 of the Sherman Act there need be no showing that all avenues of competition were eliminated, or that the price fixing effectuated its purpose (App. 93a).*

The Court of Appeals also relied on *Plymouth Dealers' Ass'n of Northern California* v. *United States*, 279 F.2d 128, 132 (9th Cir. 1960), for the established propositions that "an agreed starting point" in pricing is *per se* unlawful and that the "test is not what the actual effect is on prices but whether such agreements interfere with the freedom of traders and thereby restrain their ability to sell in accord-

* *A fortiori*, there need be no such showing in order to establish the misuse defense. It is well settled that misuse need not embody the ingredients of a Sherman Act violation. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 140 (1969); Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 494 (1942).

ance with their own judgment" (App. 92a-93a). Since the agreements here fixed "the major portion of the compensation received" by the manufacturers on the sale of their machinery, they were *per se* unlawful. Accordingly, the Court's reference to the anticipated effects of the restraint in inhibiting negotiation was not essential to its misuse holding (Pet. 9). Moreover, the evidence cited by Lex Tex does not detract from the Court's conclusion that:

> ". . . the machinery manufacturers who participated in the scheme were protected against free competition and free bargaining in effecting their sales to throwsters" (App. 92a).

Lex Tex was accorded full opportunity to submit the three papers in question to the District Court. Instead it failed to introduce a single piece of evidence to oppose the summary judgment motions. Thus, the District Court concluded that Lex Tex's opposition consisted only of "spurious denials of otherwise non-disputed material facts" (App. 29a). Indeed, the District Court found it difficult to believe that after more than three years of litigation Lex Tex was "able to generate only the most perfunctory denials of the material facts . . . submitted by [Universal] in support of these motions" (*Ibid.*).

Rule 56(e) of the Federal Rules of Civil Procedure and Local Rule 10(J)(2) of the Southern District of Florida,*

* Local Rule 10(J)(2) provides in part as follows:

"The papers opposing a motion for summary judgment shall include a memorandum of law, necessary affidavits, and a concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried. *All material facts set forth in the statement required to be served by the moving party will be deemed admitted unless controverted by the opposing party's statement.*" (emphasis supplied).

which the District Court scrupulously followed, provided the means by which Lex Tex should have brought evidence to the Court's attention. Since the evidentiary material and proposed material facts that Universal presented to the Court were not controverted by any evidence submitted by Lex Tex, and since even the evidence submitted by Lex Tex on appeal is irrelevant, no genuine issue of material fact is presented and summary judgment was properly granted.

Moreover, contrary to Lex Tex's contention,* summary judgment is the appropriate procedural vehicle where misuse of a patent can be established from the terms of written agreements to which the patentee is a party. *United States* v. *Krasnov,* 143 F. Supp. 184 (E.D. Pa. 1956), *aff'd per curiam,* 355 U.S. 5 (1957); *Berlenbach* v. *Anderson & Thompson Ski Co.,* 329 F.2d 782 (9th Cir. 1964), *cert. denied,* 379 U.S. 830 (1964); *Dubuit* v. *Harwell Enterprises, Inc.,* 336 F. Supp. 1184 (W.D.N.C. 1971), *aff'd per curiam on other grounds,* 486 F.2d 131 (4th Cir. 1973), *cert. denied,* 415 U.S. 958 (1974). Indeed, this Court has frequently upheld the use of summary judgment to proscribe antitrust restraints. *E.g., Associated Press* v. *United States,* 326 U.S. 1, 6 (1945); *Citizen Publishing Co.* v. *United States,* 394 U.S. 131, 135 (1969).

Accordingly, for all the reasons set forth above, the three bits of evidence now relied on by Lex Tex do not raise any important questions for certiorari.

* Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962) (Pet. 14), is inapposite in that there, this Court reversed a summary judgment dismissing an antitrust claim; here the Court entered a judgment of misuse. In *Poller,* "motive and intent play[ed] leading roles" (*Id.* at 472-73); here the misuse was apparent on the face of agreements. *Compare* First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968).

POINT II

The decision of the Court of Appeals is fully consistent with the controlling decisions of this Court.

The only remaining ground on which Lex Tex seeks certiorari is its contention that this case is factually distinguishable from *United States* v. *Line Material Co.*, 333 U.S. 287 (1948) (Pet. 12-14). This point plainly is insufficient to justify certiorari, since the decisions below are supported by a wealth of other Supreme Court precedents on which the Court of Appeals also relied, and the three purported distinctions of *Line Material* are inapposite.

First, Lex Tex argues that it is not a competitor of the machinery manufacturers (Pet. 13). However, Leesona and Lex Tex indisputably agreed upon the post-treating use royalties to be charged purchasers both of Leesona's machinery, and of machinery manufactured and sold by Leesona's direct competitors Barmag and Scragg—which royalties, in turn, were to be divided with each of these manufacturers (App. 100a). Manifestly, the employment of Lex Tex as a conduit for the kickbacks of this compensation to each manufacturer cannot shield this arrangement from antitrust illegality.*

Indeed, virtually the same argument was correctly rejected by the Court of Appeals when it ruled that even though Leesona set the level of this compensation unilaterally for itself and its competitors, and despite the fact

* *Cf.* United States v. Topco Associates, Inc., 405 U.S. 596 (1972); United States v. Sealy, Inc., 388 U.S. 350 (1967); American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3d Cir. 1975).

that each competitor became a party independent of the others, the arrangement still must be proscribed as one fixing prices. *United States* v. *Masonite Corp.*, 316 U.S. 265 (1942); *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948); *United States* v. *Line Material Co.*, 333 U.S. 287, 294 n.8 (1948). In *United States* v. *Masonite Corp.*, this Court held:

> "Nor can the fact that Masonite alone fixed the prices, and that the other appellees [licensees] never consulted with Masonite concerning them, make the combination any less illegal. Prices are fixed when they are agreed upon [citing *Socony-Vacuum*]. The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action" (316 U.S. at 275-76).

Next, Lex Tex argues that its agreements did not provide for a "specified price" (Pet. 13). This contention, however, simply is irrelevant in view of the Court of Appeals' rulings that "the Lex Tex royalty kickbacks to the machine manufacturers serve to fix the minimum price they receive for their machinery at a higher level" (App. 100a-101a), and that "the price of the machinery which the throwsters would have to pay was fixed" (App. 91a). As the Court of Appeals perceived, the payments that passed through Lex Tex as a "conduit" constituted the "major portion of the compensation" to be received by the machinery manufacturers, and, indeed, "with normal use, a machine would generate a share of royalties for it, much exceeding the sales price" (App. 91a).

In view of these indisputable findings, the Court's conclusions are fully supported by the decision in *United States*

v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), upon which the Court of Appeals relied, where this Court said:

> "Any combination which *tampers with price structures* is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent they *raised, lowered, or stabilized prices* they would be directly interfering with the free play of market forces. The [Sherman] Act places all such schemes beyond the pale and protects that vital part of our economy against *any degree of interference*" (310 U.S. at 221) (emphasis supplied).

In addition, the finding of misuse is supported by the decision in *Standard Oil Co. (Ind.)* v. *United States*, 283 U.S. 163 (1931) (the *Gasoline Cracking* case), upon which the Court of Appeals also relied, where this Court recognized that royalty pooling arrangements violate the Sherman Act's proscription against price-fixing where royalties are fixed at a level "tantamount" to price (283 U.S. at 174).

Finally, Lex Tex's contention that *Line Material* may be distinguished on the ground that its manufacturing "licenses" did not involve "cross-licensing" must be rejected on both legal and factual grounds (Pet. 12-13). As this Court pointed out in the *Gasoline Cracking* case, division of royalties is permissible only "according to the value attributed by the parties to their respective patent claims" (283 U.S. at 171). Where parties contribute no patents, it is unlawful for them to receive a pre-ordained share of the compensation. As the Court of Appeals recognized (App. 94a-100a, 102a), the parties to the arrangements were competing machinery manufacturers—some of which had no patent position. Yet each received the same kickback as

compensation for the machinery it sold. Since, as Lex Tex now concedes (Pet. 5), the arrangements cannot be justified by patents in the first instance, they must be deemed bare anticompetitive restraints that are *per se* unlawful.

Moreover, as the Court of Appeals recognized (App. 101a), *Line Material* holds that the Sherman Act may be violated where only a single patent is employed as alleged justification for price-fixing arrangements among multiple patentees. Thus, in applying the "general rule against price limitation" (333 U.S. at 314), the Supreme Court said:

> "The mere fact that a patentee uses his *patent* as whole or part consideration in a contract by which he and another or other patentees in the same patent field arrange for the practice of *any patent* involved in such a way that royalties or other earnings or benefits from *the patent or patents* are shared among the patentees, parties to the agreement, subjects that contract to the prohibitions of the Sherman Act whenever the selling price, for things produced under *a patent* involved, is fixed by the contract or a license authorized by the contract" (*Id.* at 315) (emphasis supplied).

Here, both Lex Tex and Leesona were patentees inasmuch as Leesona, even after assignment of the '912 patent to Lex Tex, retained ownership of the '108 patent which the parties recognized read upon post-treating. Indeed, the agreements themselves disclose the element of cross-licensing, even though it is not essential. Thus, Leesona released Lex Tex and its manufacturing licensees from infringement liability under the '108 patent. Lex Tex in turn indemni-

fied its manufacturing "licensees," including Barmag, under the '108 patent (App. 120a).*

In short, Lex Tex's efforts to distinguish *Line Material* are inapposite and in any event, the arrangements to fix the level of compensation of competing machinery manufacturers constitute a classic case of price-fixing under principles stated in numerous precedents of this Court. The Court of Appeals was thus manifestly correct in its determination that the '912 patent had been misused, and the Petition raises no important issues for review.

Conclusion

Respondent respectfully submits that the Petition should be denied.

Dated: June 3, 1977

Respectfully submitted,

DAVID KLINGSBERG
Counsel for Respondent
Universal Textured Yarns, Inc.
425 Park Avenue
New York, New York 10022
(212) 759-8400

Of Counsel:
DAVID RABIN
DAVID F. RYAN
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER

* In addition, in 1971, when the '011 patent was assigned to Lex Tex by Scragg, yet a third patent owner became a party to the post-treating arrangements. In the Court of Appeals' view, however, it was necessary to consider the situation before this assignment in 1971 "in order to establish misuse occurring before this date which would affect potential liability for infringement or breach of license agreements" (App. 101a fn.).